

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

NO. 77-4196

UNITED STATES COURT of APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

and

ELMSFORD SHEET METAL WORKS, INC.,

Intervenor,

v.

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 38,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

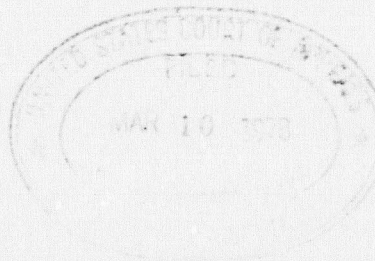
REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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I N D E X

A U T H O R I T I E S C I T E D

Cases:

Page

Allied Chemical Workers v. Pittsburgh Plate Glass,
404 U.S. 157 (1971). 2

Lodge 743 & 1746, I.A.M., etc. v. United Aircraft
Corp., 534 F. 2d 422 (C.A. 2, 1975), cert. den.,
429 U.S. 825 2

Mechanical Contractors Ass'n of Newburgh, 202
NLRB 1 (1973). 4

Statute:

National Labor Relations Act, as amended (61 Stat.
136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec.
151, et seq.)

Section 8(b)(3) 2

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This brief addresses certain contentions by respondent Local 38 and by the International in its amicus brief.

1. As Local 38 interprets the interest arbitration provision at issue here (Article X, Section 8), there can be no "impasse" over any proposed contract clause until the parties' "deadlock" has been referred to the NJAB, the NJAB has failed to reach a unanimous decision, and it has sent the matter back to the parties. According to Local 38, only if the proponent thereafter continues to make its demand a condition of agreement, would there arise an "impasse" for the purpose of the Act. (Br. 8-12). Thus, the argument runs,

when the Company first agreed to interest arbitration, it waived its normal, statutory right immediately to file a Section 8(b)(3) charge with the Board if the Local insisted to deadlock on a proposal clearly removed from the sphere of mandatory bargaining. Instead, the Company's access to the Board would be postponed at least until the NJAB had sent back the dispute. Or, if the NJAB ruled in the Union's favor, that access would be lost forever.

This waiver theory flies in the face of the settled policy against finding an intent to give up basic statutory rights in the absence of unequivocal proof that the subject was consciously explored, then clearly addressed in the parties' agreement. (See, e.g., Lodges 743 and 1746 IAM, Etc. v. United Aircraft Corp., 534 F.2d 422, 451 (C.A. 2, 1975)). The waiver theory is also inconsistent with the Supreme Court's holding that "[b]y once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." Allied Chemical Workers v. Pittsburgh Plate Glass, 404 U.S. 157, 187 (1971). Under the foregoing authority, we submit, the Company did not make a binding commitment in advance that contract disputes about non-mandatory proposals could properly be sent to arbitration and that the Company could be bound by the award. It follows, as the Board found, that the Company was entitled to file refusal-to-bargain charges against Local 38 as soon as Local 38 insisted to deadlock on the interest arbitration and industry fund demands, and that the Company was entitled to ignore the NJAB's award.

2. The International attempts to show (Br. 4-9) that a "deadlock," as used in the parties' interest arbitration clause, cannot be considered the equivalent of an "impasse" in the context of the parties' statutory duty to bargain. The reasoning is as follows:

1. If a "deadlock" were considered equivalent to an "impasse" under the Act, the parties would be entitled to invoke economic weapons at the point of "deadlock."
2. The use of economic force, however, would subvert the parties' express intent to have the NJAB resolve any "deadlock" over new contract terms.
3. Therefore, while Local 38's adamancy about the disputed proposals may have created a "deadlock", so that NJAB intervention was appropriate, it did not create an "impasse" under the provisions of the Act.

The short answer is that the parties' interest arbitration provision includes, inter alia, a prohibition against the use of economic weapons by either party until the NJAB has resolved the dispute or returned it to the parties. There is no impediment, then, to the Board's conclusion that the parties' admitted "deadlock" in the instant case was nothing more nor less than the type of bargaining "impasse" which a party may not lawfully impose on contract negotiations if the subject is one outside the scope of mandatory bargaining.

3. It makes no difference, contrary to the International (Br. 2), that the interest arbitration clause in the Columbus Pressman case provided for certain resolution of all disputes, since they were referred to a single, neutral umpire, whereas the clause here allows a dispute to revert to the parties if the NJAB cannot reach a unanimous decision. The critical similarity between these procedures is that "bipartite"

arbitration by the NJAB functions exactly like "neutral" arbitration when the NJAB does achieve unanimity. Furthermore, since the main purpose of the NJAB is to resolve contract disputes without resort to a strike or lockout, there is obviously a great incentive for the NJAB to strive for common ground in every case.

4. Local 38's reliance (Br. 11) on Mechanical Contractors Association of Newburgh, 202 NLRB 1 (1973) is also misplaced, because of critical differences in the facts. There, a divided Board panel dismissed a failure-to-bargain charge against the Association, which had insisted on keeping an existing procedure for handling new contract disputes; the Board found that this procedure in fact contemplated a further stage of bargaining, albeit at a "second level", and did not provide for true arbitration. Central to this finding was the fact that the Industrial Relations Council, the locus of "second level" bargaining, was composed of representatives from the International, the local union's parent organization, on one hand, and from the Mechanical Contractor's Association of America, the parent organization of the local Association, on the other. Here, in contrast, the Company had validly withdrawn from the local multi-employer group (the Sheet Metal and Roofers Employer's Association of Southeastern New York) whose representative on the NJAB was best equipped to protect the Company's interests. After the Company's withdrawal--and its challenge to the NJAB and the industry promotion fund--neither the representative from Southeastern or any other industry representative on the NJAB could realistically be expected to espouse the Company's interests effectively in a dispute with Local 38

about new contract terms. Any doubt on this score is dispelled by the presence before this Court of two industry organizations, the Southeastern Association and the National Association, both arrayed with Local 38.

CONCLUSION

For the foregoing reasons, and for those in our opening brief, we respectfully request that the Court enter a judgment enforcing the Board's order in full.

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